No. 19-511

In the Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,

v.

NOAH DUGUID, individually and on behalf of himself and all others similarly situated,
Respondent,

and

UNITED STATES OF AMERICA,
Respondent-Intervenor.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE CREDIT UNION NATIONAL ASSOCIATION, INC. IN SUPPORT OF PETITIONER

MICHAEL H. PRYOR
BROWNSTEIN HYATT FARBER SCHRECK, LLP
1155 F Street N.W.
Washington, DC 20004
(202) 296-7353

JULIAN R. ELLIS, JR.
Counsel of Record
MATTHEW C. ARENTSEN
JESSE D. SUTZ
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 17th Street, Suite 2200
Denver, CO 80202
(303) 223-1100
jellis@bhfs.com

Attorneys for Amicus Curiae

QUESTION PRESENTED

1. Whether the definition of an automatic telephone dialing system (ATDS) in the TCPA encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator."

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

TABLE OF AUTHORITIES (Continued)

Regulations and Rulemakings

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

Other Authorities

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

INTEREST OF AMICUS CURIAE[1]

The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,300 federal and state credit unions, which collectively serve over 120 million members.

Credit unions are not-for-profit, financial cooperatives, established "for the purpose of promoting thrift among [their] members and creating a source of credit for provident and productive purposes." Federal Credit Union Act of 1934, Pub. L. No. 73-467, § 2, 48 Stat. 1216, 1216 (1934) (codified as amended at 12 U.S.C. § 1752(1)). Most credit unions are small, local companies with limited staff and resources. Over 40 percent of all credit unions employ five or fewer full-time employees, more than 25 percent have less than $10 million in assets, and almost 75 percent have less than $100 million in assets.

Membership in credit unions is legally restricted to specific groups that are defined in credit union charters. These groups must share a common bond of occupation, association, or location. 12 U.S.C. § 1759(b)(1)–(3). By law, therefore, credit unions serve specific and known populations, and only those individuals who are within the field of membership may become members of the credit union. This

---

[1] All parties have consented to this filing. No party's counsel authored this brief in whole or in part, and no person or entity other than amicus curiae, its counsel, or its members made a monetary contribution intended to fund the brief's preparation or submission.

means that credit unions overwhelmingly make calls to a discrete membership and have little interest in or need for mass, random calling campaigns.

Credit unions do not issue stock. Their capitalization is based on member deposits and retained earnings. As a consequence, members' deposits may be directly at risk from litigation spawned by aggressive plaintiffs seeking to profit by bringing actions, sometimes transparently contrived, for alleged violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227.

Credit union members play a significant role in governance. Credit union boards are typically comprised of members who volunteer to serve as directors. This unique relationship between credit unions and their members requires a wide array of informational communications ranging from governance, to financial education, to critical fraud alerts and account status calls and texts. Members expect and welcome these informational communications.

Credit unions seeking to comply with the TCPA confront a fractured and confusing legal landscape where any misstep—such as inadvertently calling a wrong or reassigned number, misapplying one of the many FCC-created, content-based exemptions, or using efficient telephone systems—could lead to strict liability for uncapped statutory damages ranging from $500 to $1,500 *per* call or text. As a result, TCPA class action awards reach into the tens of millions of dollars. In light of the staggering statutory damages, and with no good-faith exception to liability, TCPA lawsuits have become ubiquitous. A broad definition of an ATDS that brings within its ambit virtually any type of software-driven automatic dial-

ing equipment, including smart phones, greatly exacerbates that threat of litigation. This ever-present threat severely hampers credit unions' ability to communicate with their members.

To avoid potentially crippling TCPA litigation, some credit unions have abandoned efficient calling technologies altogether, at great expense to their limited time and resources. And notifications of critical importance to members—such as notices of past due payments, overdrafts, or fraud alerts—are delayed or not made at all. As implemented, the TCPA harms credit union members, who not only forgo valuable information but who, as member-owners of the credit unions, also bear the burden of costly TCPA lawsuits. CUNA and its members thus have a unique perspective on the question presented in this case.

SUMMARY OF THE ARGUMENT

Credit unions have a unique relationship with their members that requires the communication of a wide range of information. They almost never engage in telemarketing. Instead, they seek to call their members, who collectively own the institution, to impart critically important information. Broad and inconsistent ATDS interpretations, coupled with the threat of potentially ruinous TCPA litigation, have caused credit unions to abandon or significantly curtail the use of efficient dialing technologies. As a result, members are harmed by not receiving information in a timely manner, or not at all.

Congress never intended the restrictions on the use of ATDSs to hinder normal and routine communications between a business and its customers. Rather, the restrictions were designed to prevent ran-

dom or sequentially dialed telemarketing calls from endangering public safety by seizing emergency lines and pagers and slowing commerce by clogging business lines and saddling cell phone users with substantial per minute charges.

To address these specific concerns, Congress defined a specific type of computerized system, an ATDS, that could be programmed to call large blocks of numbers in sequence, or that generated numbers randomly. Congress then made the use of an ATDS unlawful when reaching entities or devices that were most adversely affected by sequential or random number dialing. Other ills, such as prerecorded calls invading the sanctity of the home, or privacy more generally, were addressed through a separate restriction on calls using an artificial or prerecorded voice or by directing the FCC to assess technological solutions such as do-not-call lists. Congress did not restrict use of ATDSs to cure all of the ills of automated calling that animated the TCPA.

More recently, courts have mistakenly concluded that the ATDS definition should be expanded to address "new" technologies, such as predictive dialers. But predictive dialers programmed to connect specifically identified consumers to live agents were common when the TCPA was enacted. Congress was aware of these devices but chose not to include them in the statutory definition, despite requests to do so.

Courts further justify expanding the ATDS definition by erroneously claiming a number generator cannot store numbers. But ATDSs did store numbers when the statute was passed. For example, it might take hours to sequentially dial a large block of num-

bers, requiring storage of the programmed numbers before they were dialed.

Nor must the statutory definition be rewritten to accommodate the TCPA's consent exception. The restriction in 47 U.S.C. § 227(c)(1)(A) applies not just to ATDS, but to any prerecorded or artificial voice call whether dialed from a list or otherwise. The presence of the prerecorded-call restriction thus fully accounts for the consent exception.

Finally, broadly defining ATDS has had no discernible mitigating effect on the growth of robocalls. The TCPA is a woefully ineffective tool for curbing robocalls, no matter how ATDS is defined. In fact, robocalls increased substantially after the FCC's and the Ninth Circuit's broad interpretations of ATDS. To be sure, Congress and the FCC have recognized the TCPA's prohibitions do not deter judgment-proof scammers, so they have turned to technical solutions and call blocking to curb illegal robocalls. At bottom, the Ninth Circuit's broad definition of ATDS is not the answer. Failing to adhere to a narrow interpretation, as the legislative history and structure support, will further open the floodgates of litigation against credit unions and other legitimate companies.

ARGUMENT

I. The Threat of TCPA Litigation Hampers Needed Communications, Harms Credit Union Members, and Will Only Get Worse if a Broad Definition of ATDS Is Adopted.

A. The structure and role of credit unions require a wide range of informational communications.

Due to their unique structure and vital role in the communities in which they serve, credit unions must provide an array of informational communications to their members. These communications range from timely and critical account information to messages regarding financial education and the democratic decision-making process of the credit union.

Of the many initiatives pursued by credit unions, member education is at the forefront. To further this mission, credit unions often seek to inform their members about financial literacy programs and similar programs to help them develop skills for building savings, creating a budget, and managing debt. Significantly, due to their role as community-based institutions, credit unions often provide these educational opportunities and information to low- and moderate-income populations, particularly in rural areas, who are underserved by banks. As the former head of the Consumer Financial Protection Bureau (CFPB) noted, credit unions commonly serve "low-income, unbanked, underbanked and economically vulnerable consumers." Consumer Financial Protection Bureau, *Mobile Financial Services*, at 4 (Nov. 2015), https://bit.ly/32Y6t56.

The institutional importance of credit unions to their members—especially those who are financially vulnerable—cannot be overstated. Indeed, resources developed and offered by credit unions cover the entire lifecycle of their members, from promoting early savings to combatting scams against senior populations. Commenting on this point, former CFPB Director Richard Cordray highlighted "the important role that credit unions play in the lives of so many consumers and communities," and that credit unions "take [their] responsibility to [their] members very seriously, and many [credit unions] have been pacesetters as consumer educators." Richard Cordray, *Prepared Remarks of Richard Cordray Director of the Consumer Financial Protection Bureau*, Credit Union Advisory Council Meeting, Washington, D.C. (Sept. 1, 2016), https://bit.ly/3i6Bbz8.

Beyond member education, credit unions' critical communications also include: information on opportunities to cure outstanding debt balances before incurring late fees; account balance and overdraft alerts; possible breaches of members' personal and financial information; and card usage and fraud alerts. Any delay in members receiving and acting on these notifications risks financial harm.

As the nature of these communications reveals, credit unions target their communications to *existing* members with whom they have an established business relationship and who literally own the institution cooperatively with fellow members. There is no need or incentive for credit unions to place these kinds of calls or texts to anyone other than their members, nor is there any benefit to doing so. There is, however, a great harm to consumers in preventing

or otherwise disincentivizing credit unions from efficiently communicating with their members.

B. The threat of TCPA liability chills communications from credit unions to their members.

Congress never intended the TCPA "to be a barrier to the normal, expected or desired communications between businesses and their customers," typified by the informational calls that credit unions currently must think twice before making. *See* H.R. Rep. No. 102-317, at 17 (1991). The TCPA's sponsors and supporters expected that calls from businesses to their existing customers would not be banned and, in particular, that calls regarding late payments and similar informational calls would be allowed.[2] In fact, callers have always been able to make such *informational* calls to residential lines without fear of triggering the TCPA's penalties regardless of the calling technology or consumer consent. *See* 47 C.F.R. § 64.1200(a)(3)(ii)–(iii); *see also In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1,830, 1,845–48, ¶¶ 35–43 (2012) (*2012 TCPA Order*). Such calls—autodialed or otherwise—do not raise the same privacy concerns as traditional telemarketing calls. *See id.* ¶ 36.

Nevertheless, under the Ninth Circuit's interpretation of ATDS, the same informational calls that are exempt from the TCPA when made to residential

---

[2] *See, e.g.*, 137 Cong. Rec. 18,785 (1991) (statement of Sen. Pressler) (explaining the TCPA exempts calls by businesses to their customers); 137 Cong. Rec. 11,311 (1991) (statement of Rep. Rinoldo) (same); *id.* at 11,312 (statement of Rep. Lent) (noting the TCPA does not bar late payment reminder calls).

lines are subject to the statute's strict liability provisions when made to cell phones using efficient calling technologies. Conservative by nature, credit unions have sought to mitigate litigation risk by forgoing the use of efficient calling and text messaging technologies and are instead resorting to manually dialing each call or sending communications by mail. Given the limited resources of most credit unions, abandoning the use of efficient technology means that some members are not reached in a timely manner or are not reached at all.

The chilling effects of potential TCPA liability are exacerbated by the fractured regulatory and legal landscape created through layers of FCC-adopted exemptions and confusing and conflicting interpretations that fail to provide any guidance to callers. *See, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687, 701 (D.C. Cir. 2018). The FCC has simultaneously held that an ATDS must have the capacity to generate random or sequential numbers, but also that equipment can be an ATDS if it calls from lists. *Id.* at 700–04. Courts have reached conflicting conclusions on virtually every aspect of the statutory definition, from ascertaining the equipment's requisite capacity,[3] to the degree of human intervention required to remove equipment from the ATDS definition.[4]

---

[3] *Compare Allan v. Penn. Higher Educ. Assistance Agency*, 968 F.3d 567, 579–80 (6th Cir. 2020) (holding ATDS includes equipment that dials from lists), *with Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 464–69 (7th Cir. 2020) (holding ATDS only includes equipment with capacity to generate random or sequential numbers).

[4] *Compare Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 288–89 (2d Cir. 2020) ("Merely clicking 'send' or an equivalent

Apart from attempting to discern which side of the liability line dialing equipment falls, credit unions must navigate myriad of other regulatory obstacles, including whether a member's phone number belongs to a landline phone or cell phone, whether the credit union has documented consent, whether the member has sought to reasonably withdraw consent, and whether the credit union's call might qualify for one of the FCC-created exemptions. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7,961, 8,023–28, ¶¶ 125–39 (2015) (*2015 TCPA Order*) (exempting certain time-sensitive calls to cell phones but only if free to the subscriber and subject to other constraints). Having waded through that thicket, the credit union must still hope that it does not have a wrong number or one that the member has changed without notice. Innocently calling a wrong or reassigned phone number is a leading cause of TCPA litigation, and there is no safe harbor from liability.

It is therefore no surprise that more than three-fourths (76%) of credit unions responding to a survey conducted by CUNA in 2017, reported that it is "very difficult" (30%) or "somewhat difficult" (46%) to determine whether their communications are compliant with the TCPA. The same survey found that more than one in three credit unions (35%) that had used text messaging to communicate with their members in the past have cut-back or outright dis-

---

button in a text messaging program" is insufficient human intervention.), *with Fleming v. Associated Credit Servs., Inc.*, 342 F. Supp. 3d 563, 577–78 (D.N.J. 2018) (finding use of "clicker agent" who clicked on numbers from a list sufficient human intervention to bring device outside the statutory definition).

continued texting members, in fear that the device sending the texts will be deemed an ATDS. Three-fourths (75%) of credit unions that had used some form of an efficient, automated artificial or prerecorded voice messaging system in the past have curtailed or ceased using such communications.

The American Airlines Federal Credit Union (AAFCU) recently provided evidence of the chilling effect of the TCPA. The AAFCU informed the FCC that due to the agency's unclear and at times expansive definition of ATDS, the AAFCU abandoned the use of automated dialing equipment altogether. *Am. Airlines Fed. Credit Union Notice of Ex-Parte Presentation*, CG Docket No. 18–152, CG Docket No. 02–278 (May 17, 2019), https://bit.ly/32Z1q2n (*AAFCU Letter*). Like other credit unions, the AAFCU reverted to contacting its members by manually dialing calls or by sending mail rather than texts, increasing its (and its members') costs while reducing the number of contacts it could make.

Credit unions' concerns with the risk of litigation are, unfortunately, well-founded. The TCPA is a strict liability statute with no good-faith defenses, *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 775–76 (11th Cir. 2011) ("The TCPA is essentially a strict liability statute . . . ."), and TCPA cases are often filed as class actions to maximize their *in terrorem* effect. Even though they are non-profit organizations, TCPA litigation against credit unions is by no means uncommon.[5] And, given the statutory

[5] *See, e.g.*, Complaint, *Nunez v. Tex. Dow Emps. Credit Union*, Case No. 20-cv-00252 (S.D. Tex. July 29, 2019) (alleging violations of the TCPA's autodialer restriction); Complaint,

damages of $500 (or up to $1,500 for willful violations) per call or text, these cases get expensive very fast. For instance, just this spring, Navy Federal Credit Union settled an autodialer class action for $9,250,000—a crippling amount to most credit unions. *See* Emilie Ruscoe, *Navy Federal Credit Union Settles Robotext Claims For $9.25M*, Law360.com (Mar. 12, 2020), https://bit.ly/3i6qFYW.

By adopting a narrow definition of ATDS that hews closely to the statutory language and congressional intent, this Court will bring clarity to the current regulatory and legal morass. Confirming that an ATDS must generate random or sequential numbers will enable credit unions to utilize efficient dialing technology and effective communication tools. Most importantly, credit union members will benefit because they will be more likely to receive critical information in a timely manner.

C. Curtailed or delayed communications harm credit union members.

The practical inability to use efficient dialing technologies causes direct harm to credit union members who may not timely receive important information. For instance, the threat of litigation limits the ability of credit unions, along with other financial institutions, to notify consumers of financial relief following natural disasters. The AAFCU made this point to the FCC after it used mail, where available, to notify its members of special disaster loans and loan deferral options following a series of devastating hurricanes. *AAFCU Letter* at 2. Similarly, the Feder-

---

Ciampi v. Navy Fed. Credit Union, Case No. 20-cv-6833 (C.D. Cal. July 30, 2020) (same).

al Housing Finance Agency told the FCC that, due to potential TCPA liability, consumers were not receiving needed and urgent disaster-related notifications about loan repayment options. *Federal Housing & Finance Agency Notice of Ex-Parte Presentation*, CG Docket No. 02–278 (Apr. 27, 2019), *available at* https://bit.ly/2OsIMui. Even the FCC has tacitly acknowledged the chilling effect caused by the TCPA. During the current COVID-19 pandemic, the FCC found it necessary to issue specific exemptions for health-related communications so that public health agencies do not face the threat of litigation. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02–278, 2020 WL 1491502 (Mar. 20, 2020); *Consumer and Governmental Affairs Bureau Clarification on Emergency COVID-19 Related Calls*, CG Docket No. 02–278 (July 28, 2020), *available at* https://bit.ly/3h3kvaz.

Communication delays caused by forgoing efficient dialing technologies also cause direct financial harm to consumers. For example, credit unions are limited in their ability to provide payment reminders for late payments. Providing efficient and timely notification ensures that late payments can be made before the credit union must report to the credit bureaus, which adversely affects credit scores. The AAFCU estimated that using efficient dialing technologies to notify members of past due payments would result in hundreds of its members making payments before credit bureaus are notified and would reduce loan charge-offs by hundreds of thousands of dollars per quarter. *AAFCU Letter* at 3–4.

These consumer harms can be avoided by narrowly defining ATDS to apply only to equipment that

has the capacity to generate random or sequential numbers and to automatically call those numbers. If, instead, this Court interprets the statutory definition of ATDS to apply whenever a credit union uploads curated lists of members to be called about disaster relief or late payments, credit unions will continue to be hamstrung in servicing their members' financial needs. Quite perversely, broadly defining what constitutes an ATDS has converted a pro-consumer statute into one that actually harms consumers.

II. Congress Did Not Intend an ATDS to Include Equipment that Dials from Lists.

The TCPA's legislative history and structure reflect the limited scope of the ATDS restriction. Section 227(b) of the TCPA restricts the use of "automated telephone equipment," which includes ATDSs and equipment that delivers artificial or prerecorded voice messages. Congress imposed restrictions on the use of ATDS primarily to address specific public safety harms caused by random or sequential dialing—not to safeguard consumer privacy or curb informational calls. Congress addressed consumer privacy by restricting calls using an artificial or prerecorded voice (regardless of how the call was dialed), which Congress referred to as computerized voice calls (today, robocalls).[6] Tellingly, while predictive dialers

[6] 47 U.S.C. § 227(b)(1)(A) (restricting use of ATDS or artificial or prerecorded voice for calling specific lines or entities); § 227(b)(1)(B) (restricting use of artificial or prerecorded voice to home landline phones). The TCPA further protected subscriber privacy by directing the FCC to assess alternatives, such as a database "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." § 227(c) ("Protection of subscriber privacy rights.").

and other systems that called from preprogrammed lists and connected consumers to live sales agents were commonplace and known to Congress at the time of the TCPA's enactment, Congress was focused on the harms caused by sequential-dialing ATDSs and prerecorded voice calls. Adopting an expansive definition of ATDS—for example, a definition barring predictive dialer-assisted live calls from credit unions to their members conveying important financial information—runs counter to congressional intent.

A. Limiting the ATDS definition to equipment with a random or sequential number generator is consistent with the TCPA's history and structure.

The ills Congress sought to cure reveal the intended scope of the ATDS definition. A key goal of the TCPA was the "eradicat[ion of] machines that dialed randomly or sequentially generated numbers."[7] Dialing numbers randomly or in large sequential blocks resulted in calls to emergency services, hospitals, pagers, or businesses—often tying up these lines and creating public safety hazards and interfering with interstate commerce.[8] Random or sequential

---

[7] *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1311 (11th Cir. 2020) (citing *Telemarketing/Privacy Issues: Hearing on H.R. 1304 & H.R. 1305 Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce*, 102d Cong. 1 (1991) (statement of Chairman Edward J. Markey)).

[8] *See, e.g.*, *Telephone Advertising Regulation Act: Hearing on H.R. 2921 Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce*, 101st Cong. 86 (1990) ("Public safety concerns are also present in two instances. First, automatic dialing systems are often programmed to dial whole blocks of telephone numbers in sequence. These calls inevitably reach hospitals, police and fire stations, and other emergency

dialing also reached the relatively few cell phones then in use, generating huge costs to their users who incurred substantial per minute rates when receiving calls.[9] The structure of the ATDS restriction confirms the consequences of randomly or sequentially dialed calls reaching these entities or devices were the concerns animating Congress when it drafted the ATDS definition. *See* 47 U.S.C. § 227(b)(1)(A)(i)–(iii) (barring use of ATDS to call emergency telephone lines, hospitals and paging services, cell phones, specialized mobile radio service, or other wireless common carrier services); § 227(b)(1)(D) (barring use of ATDS "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously").

In analyzing the proper interpretation of ATDS, it is important to differentiate between the specific concerns of random and sequential dialing that are addressed by the ATDS definition and the privacy concerns that led Congress to excoriate telemarketing as the scourge of civilization. The restrictions on

---

numbers. (Such programs also lead to calls to cellular phones, pagers and unlisted numbers.) Second, autodialers frequently are not equipped to release the called parties [*sic*] line after the party has hung up."); *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131, and H.R. 2184 Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce*, 101st Cong. 78 (1989) (*Telemarketing Practices Hearings*) (statement of Steven S. Seltzer, President, Modern Commc'ns Corp.) (explaining wireless carriers obtain large blocks of sequential numbers that can be tied up when automatic dialing systems are "programmed to dial a sequential range of numbers").

[9] *Telemarketing Practices Hearings*, 101st Cong. 78 (noting cell phone users' costs of 50 cents per minute). Unlike landline phones, which incur costs only when making calls, cell phone users incurred costs whether making or receiving calls.

ATDS targeted the random or sequential dialing that seized public emergency lines, tied up doctors' pagers, disrupted business operations, or imposed costs on call recipients. Subscriber privacy, on the other hand, was addressed by a combination of restricting use of automated prerecorded or artificial voice messages and directing the FCC to assess technological solutions such as do-not-call lists for telemarketing calls. § 227(b)(1)(B), (c). The fact that the ATDS restrictions were not primarily concerned with privacy is apparent from Congress's failure to bar the use of ATDS for calls to "residential telephone lines," the predominant communication platform used by consumers in the early 1990s.[10]

Congress's concern with and express prohibition of artificial and prerecorded voice calls further evince its relative lack of concern with live informational calls, including informational calls made with predictive dialers.[11] This is not to say live calls were or are

---

[10] *Compare* § 227(b)(1)(A) (barring use of ATDS or prerecorded or artificial voice calls to emergency lines, hospitals, and cells phones), *with* § 227(b)(1)(B) (barring use of artificial or prerecorded voice messages to residential telephone lines). When the TCPA was being considered, only about 2 million telephone subscribers had cell phones, compared to some 127 million subscribers using landline, including all home phones. *See Telemarketing Practices Hearings*, 101st Cong. 78.

[11] *See, e.g.*, S. Rep. No. 102-178, at 4–5 (1991) ("[I]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons."). *See also S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearings on S. 857, S. 1410, and S. 1462 Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., & Transp.*, 102d

categorically allowed. Live telemarketing calls, including those dialed manually or with predictive dialers, are regulated. As described below, both Congress and the FCC were well aware that predictive dialers were increasingly being used by telemarketers at the time the TCPA was first considered and initially implemented. In its 1992 initial order implementing the TCPA, the FCC addressed whether to differentiate between live calls, "particularly by those made by predictive dialers (which deliver calls to live operators)" and prerecorded messages. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8,756, ¶ 8 (1992) (*1992 TCPA Order*). It concluded that live calls should be regulated not by expanding the definition of ATDS to include predictive dialers, but by establishing company-specific do-not-call lists, which balanced residential privacy with commercial speech rights. *Id.* ¶¶ 9, 23 (noting company specific do-not-call lists are "the most effective and efficient means to permit telephone subscribers to avoid unwanted calls").[12] In the same order, the FCC confirmed only equipment that called numbers "generated in a ran-

---

Cong. 3 (1991) (*Subcomm. on Commc'ns Hearing*) (opening statement of Sen. Hollings) (detailing constituent complaint of being "roused with a telephone [marketing] message, apparently taped" and explaining "that is an example of the automated calls that this Senator is concerned with, not the live, conversational solicitations"); *id.* ("My particular bill [the then-future TCPA] and its thrust is to the automated, mechanically generated type calls.").

[12] The FCC initially rejected establishing a single, national call list, which it finally adopted in 2003. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14,014, 14,033 (2003).

dom or sequential fashion" qualified as an ATDS. *Glasser*, 948 F.3d at 1308 (quoting *1992 TCPA Order*, 7 FCC Rcd. at 8,776). The FCC reaffirmed this understanding in 1995, when it found the TCPA did not cover calls "directed to . . . specifically programmed contact number[s]"; rather, it only covered calls to "randomly or sequentially generated telephone numbers." *Id.* (quoting *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12,391, 12,400 (1995)).

To be sure, the agency changed course in 2003, and concluded for the first time that an ATDS covered devices that merely stored and called numbers. *Id.* (citing *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14,014, 14,091 (2003)). But to suggest this agency action was proper because predictive dialers were a new technology or because Congress sought to prohibit the use of predictive dialers regardless of the nature of the call ignores the TCPA's history.

Finally, limiting the ATDS definition to its congressionally intended scope would not open consumers' cellular phones to a rash of automated calls and texts by legitimate callers. Artificial and prerecorded voice calls to cellular phones would still be barred absent appropriate consent. And consumers can protect themselves by placing their phone numbers on the national "do-not-call" list or on company-specific lists and enforce violations through a private right of action. Even more, other federal and state laws ban abusive, deceptive, or unfair phone calls.[13]

---

[13] *See, e.g.*, 12 U.S.C. § 5531; 15 U.S.C. § 45; 15 U.S.C. §§ 1692, 1692c; California Unfair Competition Law, Cal. Bus. &

B. Systems that autodialed stored lists of numbers were pervasive in 1991, and Congress chose to exclude them.

To buttress their conclusions that the ATDS definition includes predictive dialers and other devices that automatically dial from stored lists, the Ninth,[14] Second,[15] and Sixth[16] Circuits relied on the premise that such systems are new technologies developed and utilized only after the TCPA's enactment. In other words, according to those circuits, because "the

---

Prof. Code §§ 17200 to 17210; Cal. Civ. Code § 1770(a)(22)(A); California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788 to 1788.33.

[14] *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1045 (9th Cir. 2018) ("Unlike the automated telemarketing devices prevalent in the early 1990s, which dialed a random or sequential block of numbers, predictive dialers generally automatically dialed a list of numbers that had been preprogrammed and stored in the dialer, or were downloaded from a computer database. . . . In order to determine whether the TCPA applied to this new technology, the FCC had to assess whether the predictive dialer qualified as an ATDS.").

[15] *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 288 (2d Cir. 2020) ("But the TCPA predates the use of predictive dialers—which is exactly why the FCC felt compelled to specify its application to this new technology in 2003. To assume that a key feature of predictive dialers must be a key feature of all ATDSs, especially when we know that many early ATDSs did not have the ability to automatically determine the time at which a call or text would get sent out, is anachronistic at best.").

[16] *Allan v. Penn. Higher Educ. Assistance Agency*, 968 F.3d 567, 578 (6th Cir. 2020) ("When a new application emerges that is both unexpected and important, [the Eleventh Circuit] would seemingly have us . . . decline to enforce the plain terms of the law. . . . That is exactly the sort of reasoning [the Supreme] Court has long rejected." (quoting *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1750 (2020))).

TCPA predates the use of predictive dialers," *Duran*, 955 F.3d at 288, they—like the FCC—needed "to determine whether the TCPA applied to this new technology," *Marks*, 904 F.3d at 1045. The fatal problem with this reasoning is that predictive dialing is not a "new technology." Telemarketers and other callers routinely and increasingly utilized such systems at the time the TCPA was enacted, and Congress was well aware of this. Thus, Congress's inclusion of autodialers with random or sequential number generators—but its omission of predictive dialers—is compelling evidence that it did not intend to sweep all automated-calling systems into the ATDS definition.

Contrary to the Ninth, Second, and Sixth Circuits' understanding, "automated telemarketing devices" that "dialed a random or sequential block of numbers" were not the only types of autodialers "prevalent in the early 1990s." *Id.* Rather, predictive dialers—devices that "automatically dialed a list of numbers that had been preprogrammed and stored in the dialer, or were downloaded from a computer database," *id.*—had also become commonplace. In congressional testimony from 1991 and prior to the TCPA's enactment, a witness described to the Senate (including the bill's sponsors, Senators Hollings and Pressler) the use and proliferation of predictive dialers. Among other details, the witness informed the Senate that "between 30 to 40 percent of the national telemarketing firms are using [predictive dialers] this year. Predictive dialers dial in advance of the availability of a telemarketer to take the call of the person who answers their phone." *Subcomm. on Commc'ns Hearing*, 102d Cong. 16, 19 (statement of Robert Bulmash, President, Private Citizen, Inc.).

Additionally, two years earlier, one witness testified at a hearing on a precursor bill concerning the differences between random and sequential dialers and those that can be programmed to call from lists; he emphasized the proposed legislation did not (and should not) cover such "programmable" systems:

> *Similarly, H.R. 628 seemingly governs any equipment which stores or produces numbers to be called using a "random" or "sequential" generator. There is, however, a sharp technological distinction between "random" or "sequential" number generation and "programmable" number generation.* Programmable equipment is used in many business applications. . . . Programmable equipment enables a business to transmit a standard, sometimes referred to as 'broadcast,' message quickly to a large number of telephone subscribers who may urgently need or want to receive a message or with whom the sender has a prior business relationship and who will therefore benefit from its receipt.

Telemarketing Practices Hearing, 101st Cong. 40–41 (emphasis added) (statement of Richard A. Barton, Senior V.P., Direct Mktg. Ass'n). Similarly, a law professor commenting on the same bill explained: "The definition of 'automatic telephone dialing system' . . . is quite limited: it only includes systems which dial numbers sequentially or at random. That definition does not include newer equipment which is capable of dialing numbers gleaned from a database." *Id.* at 71–72 (statement of Professor Robert L. Ellis). These statements leave no doubt that predictive dialing is not new and also underscore that the TCPA's consent exception was crafted to cover prerecorded

and artificial voice calls, not autodialed live calls. *See Subcomm. on Commc'ns Hearing*, 102d Cong. 13 (resolution of Nat'l Ass'n of State Utility Consumer Advocates) ("The use of automatic telephone dialing systems *which play recorded messages* should be reasonably restricted, except where a called party has given prior consent." (emphasis added)).

It is also telling that Congress rejected a proposed definition of ATDS that would have included dialing from lists. The South Carolina Department of Consumer Affairs Administrator, Steve Hamm, in his prepared remarks suggested that the definition of ATDS in the bill be amended to read: "to store or produce telephone numbers to be called using a random, sequential *or programmed* number generator." *Id.* at 11 (emphasis added). *See also* H.R. Rep No. 101-43, at 71 (1989) (statement of Professor Robert Ellis) (suggesting a suitable definition of ATDS would be "any device or combination of devices capable of calling multiple telephone numbers sequentially, randomly, or selectively, without the need for a person to manually dial or enter the digits of the telephone number to be called at the time the number is called"). The phrase "or programmed" obviously refers to calling telephone numbers generated in a manner other than randomly or sequentially. "Programmed" implies calling specifically identified lists of numbers. In sum, Congress was aware of the use of equipment that dialed from programmed lists, such as predictive dialers, but chose not to include such equipment within the ATDS definition.

C. Reliance on the ATDS definition's inclusion of storage capability and the TCPA's consent exception does not justify a broad interpretation of ATDS.

Courts interpreting ATDS broadly to include devices that call from preprogrammed lists rely on two primary arguments. One is that, by including the capability to store as well as produce numbers, ATDS must include systems that dial lists automatically since number generators do not store numbers. Second, the consent exception to 47 U.S.C. § 227(b)'s prohibition on the use of "automated telephone equipment" must mean ATDSs call from programmed lists. Both arguments are flawed.

Random and sequential number generators stored numbers—in fact, they had to in order to engage in sequential calling. Congress was informed that automatic dialing machines were programmed to call large blocks of consecutive numbers that resulted in one line after another (or one pager after another) being called over a period of hours, leading to harms to public safety and interfering with commerce. *See Telemarketing Practices Hearings*, 101st Cong. 78 (statement of Steven S. Seltzer, President, Modern Commc'ns Corp.). These numbers obviously were stored until they were dialed. The court in *Gadelhak v. AT&T Servs., Inc.* recognized that ATDSs stored phone numbers "for a significant time before selecting them for dialing" and that storage was "central to such a device's function." 950 F.3d 458, 465 (7th Cir. 2020) (citing Noble Systems Corp., *Comments on FCC's Request for Comments on the Interpretation of the TCPA in Light of* Marks v. Crunch San Diego (Oct. 16, 2018), *available at*

https://bit.ly/2CQ EmrY); *accord Glasser*, 948 F.3d at 1307. And Congress was aware ATDSs included programmable databases separate from the dialing function.[17] But this does not mean stored numbers must be derived from lists.

Nor does § 227(b)'s exception for consented-to-calls require defining ATDS to include lists. The most glaring flaw with this line of reasoning is that § 227(b)(1)(A) prohibits not only the use of an ATDS, *but also the use of an artificial or prerecorded voice*, a clause virtually ignored by the courts broadly defining ATDS. Artificial or prerecorded voice calls are the "computerized" voice calls that Congress decried as the scourge of civilization. Unlike ATDSs, which are confined to random or sequential calling, the restriction on use of an artificial or prerecorded voice applies to numbers from curated lists. Including a consent exception in the restriction on the use of ATDS *or* the use of automated prerecorded or artificial voice messages in no way requires including calls to specific listed numbers in the ATDS definition.

It is also clear the consent exception cannot apply to all of the entities or devices subject to the restriction in § 227(b)(1)(A). There is no reason, for example, to consent to calls to pagers because they are not equipped to receive rerecorded messages. Nor is it plausible that a 911 operator would consent to a

---

[17] *See Telemarketing Practices Hearings*, 101st Cong. 71–72 (statement of Professor Robert Ellis) (describing equipment that dials numbers from a database); *see also id.* at 39–41 (statement of Richard A. Barton, Vice President, Direct Marketing Association) (describing systems where numbers are stored in a database separate from the dialing terminal equipment connected to the phone network).

computerized voice or autodialed telemarketing call (regardless of the scope of the ATDS definition). In other words, the consent exception applies to some but not all of § 227(b), and it is therefore reasonable to infer Congress intended exception to apply only where it could be implemented, such as with prerecorded or artificial voice calls to cell phones. As such, there is no basis to conclude from the structure of § 227(b)(1)(A) that an ATDS must include devices that call from lists because consumers must be able to consent to such calls on their cell phones. Put differently, the prohibition on the use of an ATDS need not be accompanied by a consent exception.

III. Interpreting the ATDS Definition Broadly Will Not Enhance Consumer Protection.

Appropriately defining ATDS to apply only to equipment capable of storing or producing randomly or sequentially generated numbers will have little, if any, effect on the volume of unwanted robocalls. The TCPA has proven wholly ineffective in restraining the volume of robocalls, regardless of how ATDS is defined. This has led Congress, the FCC, and the telecommunications industry to turn to a variety of technological solutions that seek to stop illegal robocalls at their source. *A Report of the Consumer and Governmental Affairs Bureau on Robocalls*, CG Docket No. 17–59, at 1 (Feb. 2019) (*2019 FCC Report*), *available at* https://bit.ly/2GuHSNC (noting that until recently there have been limited effective ways to address robocalls and highlighting a new approach to combat the problem through technological solutions such as call blocking). These solutions can identify and target truly "bad actors" without creating incentives to sue legitimate companies.

The TCPA's ineffectiveness is corroborated by the sharp spikes in robocall volumes and complaints following the broad ATDS interpretations. The *2015 TCPA Order* adopted an ATDS interpretation of "eye-popping" breadth that included any device, including smart phones, potentially capable of dialing from preinstalled customer lists. *See ACA Int'l v. FCC*, 885 F.3d 687, 703 (D.C. Cir. 2018) (setting aside FCC's ATDS interpretation). While it was in effect, the FCC's extraordinarily broad interpretation had no discernable deterrent effect on the number of robocalls. To the contrary, the number of robocalls skyrocketed from about 8.7 billion calls (from April through December 2015) to more than 29 billion and 30.5 billion calls respectively in 2016 and 2017.[18] Robocall complaints also rose sharply after the *2015 TCPA Order*, from 2.1 million complaints in 2015, to 3.4 million and 4.5 million complaints respectively in 2016 and 2017. *2019 FCC Report* ¶ 11.

Similarly, the Ninth Circuit's 2018 *Marks* decision, which adopted a broad ATDS definition, has had no effect in stemming the tide of robocalls in the

---

[18] *Historical Robocalls By Time*, YouMail Robocall Index, https://bit.ly/3i104we (last visited Sept. 10, 2020) (*YouMail Index By Time*). YouMail does not distinguish between legal and illegal robocalls. Robocalls is a description of calls using artificial or prerecorded robotic sounding messages and is not defined in the TCPA. As Congress has recognized, many robocalls are not only legal, but vitally important and include messages with "life or death consequences for the intended recipient." S. Rep. No. 116-41, at 3 (2019). Nevertheless, YouMail's data provide a basis for comparison and is cited in the *2019 FCC Report*. The volume of robocalls continued to rise in 2018 (47.8 billion calls) and 2019 (58.5 billion calls) according to YouMail's analysis. *See generally*, *YouMail Index By Time*.

Ninth Circuit. In California, for example, robocalls increased from 5.3 billion calls in 2018 to 6.0 billion calls in 2019. Oregon and Washington also saw increases. Robocalls in Oregon increased from about 350 million calls to 431 million calls between 2018 and 2019, while robocalls in Washington rose from 560 million calls to 696 million calls. *See Historical Robocalls By State*, YouMail Robocall Index, https://bit.ly/2ZaFWk4 (last visited Sept. 10, 2020).

The reason there is no noticeable effect is straightforward. Many of the most egregious illegal robocallers in terms of volume and malicious intent are judgment proof and hence are not deterred by regulatory prescriptions, even those imposing strict liability and statutory damages. The FCC's own enforcement efforts tell the tale. As of early 2019, the FCC had levied $208 million in fines against egregious TCPA violators, but had collected less than $7,000. Sarah Crouse, *The FCC Has Fined Robocallers $208 Million. It's Collected $6,790.*, Wall Street Journal (Mar. 28, 2019), https://on.wsj.com/2GuIIde. Plaintiffs' lawyers have no interest in pursuing these bad actors, many of whom are foreign based. Instead, plaintiffs' lawyers utilize the TCPA's primary enforcement mechanism of private lawsuits to target legitimate businesses making good-faith efforts to comply with the TCPA's byzantine requirements, and not "illegal telemarketers, the over-the-phone-scam artists, and the foreign fraudsters" that terrorize consumers. *2015 TCPA Order*, 30 FCC Rcd. at 8,073 (dissenting Statement of Commissioner Ajit Pai). As now-Chairman Pai wrote, the TCPA is the "poster child for lawsuit abuse." *Id.*

The failure of the TCPA's restrictions to curb illegal robocalls led the FCC in 2016 to convene an industry task force to find technological solutions to "abate the proliferation of illegal and unwanted robocalls." *Robocall Strike Force Report*, at 1 (Oct. 26, 2016) https://bit.ly/2F4b6CK. The FCC has since enacted an ever broader set of technological responses, including authorizing telephone companies to block suspected illegal or unwanted calls before they reach consumers, and creating a database of reassigned numbers.[19] At the same time, industry developed standards to allow telephone companies to authenticate the validity of the calling telephone number that appears in the caller ID. These standards, known as STIR/SHAKEN,[20] are designed to prevent spoofing, which entails inserting a fake number in the caller ID so it appears a legitimate entity, such as the IRS, is calling. *See* S. Rep. No. 116-41, at 3. The framework also identifies the telephone company originat-

---

[19] *See, e.g.*, *In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 32 FCC Rcd. 9,706 (2017) (authorizing telephone companies to block calls from certain types of phone numbers indicating the call is likely to be illegal); *In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 33 FCC Rcd. 12,024 (2018) (establishing a database to track telephone numbers reassigned to new users); *In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 34 FCC Rcd. 4,876 (2019) (authorizing telephone companies to block calls based on calling characteristics such as call volume or duration unless consumers opt out); *In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 85 Fed. Reg. 46063-01 (proposed July 31, 2020) (granting telephone companies safe harbor from liability for erroneously blocking legitimate calls).

[20] The acronym stands for Secure Telephony Identity Revisited (STIR)/Signature-based Handling of Asserted Information Using toKENs (SHAKEN).

ing a robocall, a process that often requires identifying the multiple carriers involved in transmitting a call end-to-end. *See In re Implementing the Pallone-Thune Tel. Robocall Abuse Criminal Enforcement & Deterrence Act*, 85 Fed. Reg. 21785-01 (Apr. 20, 2020) (establishing an industry group to trace the origin of robocalls). Congress and the FCC have mandated implementation of this framework to "respond to scourge of illegal robocalls." S. Rep. No. 116-41, at 6; *see also In re Call Authentication Trust Anchor*, 34 FCC Rcd. 3,241 (Mar. 31, 2020); Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), Pub. L. No. 116-105, 133 Stat. 3274 (2019). The TRACED Act reflects Congress's recognition that the TCPA's legal restrictions are not reducing robocalls and that technical solutions are necessary. S. Rep. No. 116-41, at 2 (noting robocalls are likely to increase notwithstanding the TCPA); *see also id.* at 5 (finding implementation of call authentication technology is necessary).

A broad definition of ATDS does nothing to curb illegal robocalls by bad actors. That said, it does further open the floodgates of litigation against credit unions and other legitimate companies.[21]

CONCLUSION

By confirming that ATDSs are limited to equipment that calls randomly or sequentially generated numbers, the Court will be faithful to the structure and intent of the TCPA.

---

[21] *See TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Inst. for Legal Reform, at 2 (Aug. 31, 2017), https://bit.ly/2F7hUz8 (noting litigation "boomed" 46% after the *2015 TCPA Order*).

Respectfully submitted,

MICHAEL H. PRYOR
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
1155 F Street N.W.
Washington, DC 20004
(202) 296-7353

JULIAN R. ELLIS, JR.
Counsel of Record
MATTHEW C. ARENTSEN
JESSE D. SUTZ
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
410 17th Street, Suite 2200
Denver, CO 80202
(303) 223-1100
jellis@bhfs.com

Attorneys for Amicus Curiae

SEPTEMBER 11, 2020